

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

DANA-FARBER CANCER INSTITUTE,  
INC. a/k/a THE JIMMY FUND  
375 Longwood Avenue  
Boston, Massachusetts 02215

Plaintiff,

v.

BOC GROUP, INC. d/b/a BOC GASES  
575 Mountain Avenue  
Murray Hill, New Jersey 07974

Defendant

CASE NO.:

TRIAL BY JURY

04<sup>th</sup> 12612 RCL

RECEIPT # 60823  
AMOUNT \$ 150  
SUMMONS ISSUED Y-1  
LOCAL RULE 4.1  
WAIVER FORM  
MCF ISSUED  
BY DPTY. CLK. M  
DATE 12-15-04

COMPLAINT AND DEMAND FOR JURY

MAGISTRATE JUDGE Coker

Plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund, by and through its attorneys, Patrick J. Loftus, III, Peter G. Rossi and Hayes A. Hunt, complain of the defendant, BOC Group, Inc. d/b/a BOC Gases, herein, allege upon information and belief as follows:

PARTIES

1. Plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund (hereinafter referred to as "Dana-Farber"), is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business located at 375 Longwood Avenue, Boston, Massachusetts, and at all times relevant hereto was involved in medical research and testing.

2. At all times material hereto, Dana-Farber operated a research facility known as Premise #5, located at 1 Jimmy Fund Way, Boston, Massachusetts (hereinafter referred to as "Subject Premises").

3. Defendant, BOC Group, Inc. d/b/a BOC Gases (hereinafter referred to as "BOC"), is a corporation duly organized and existing under the laws of the State of Delaware, with its

principal place of business located at 575 Mountain Avenue, Murray Hill, New Jersey, and at all times relevant hereto was engaged, *inter alia*, in the business of manufacturing, distributing, selling, supplying and maintaining industrial gases and related refrigeration equipment in the Commonwealth of Massachusetts.

### JURISDICTION

4. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1332, by reason of diversity of citizenship of the parties.

5. The matter in controversy, exclusive of interest and costs, exceeds the sum of \$75,000.00 and venue is proper in the United States District Court for the District of Massachusetts pursuant to the provisions of 28 U.S.C. § 1391.

### GENERAL ALLEGATIONS

6. Prior to August 2, 2002, Dana-Farber and BOC entered into a contract pursuant to which BOC agreed to, *inter alia*, sell and supply a Taylor Wharton liquid nitrogen freezer unit with a Pacer Digital control system (hereinafter "Freezer") to Dana-Farber.

7. Prior to August 2, 2002, Dana-Farber and BOC entered into a contract pursuant to which BOC agreed to, *inter alia*, service and maintain the aforesaid Freezer.

8. Upon receipt by Dana-Farber the Freezer was used to freeze, store and maintain biological samples including human stem cells.

9. The Freezer's temperature was controlled by the amount of liquid nitrogen in the unit.

10. On August 2, 2002, the Freezer failed to operate properly and maintain proper temperatures.

11. BOC was notified of the Freezer's failure to operate properly and maintain proper temperatures.

12. Pursuant to the aforesaid notification and on or about August 9, 2002 an employee of BOC inspected and serviced the Freezer and informed Dana-Farber that it was functioning properly.

13. In reliance on BOC's advice Dana-Farber continued to operate the Freezer.

14. On August 15, 2002 the Freezer malfunctioned causing its temperature to rise and contents to thaw destroying the biological samples resulting in loss of and damage to Dana-Farber's property.

**COUNT I**  
**NEGLIGENCE**

15. Plaintiff incorporates by reference the averments of paragraphs one (1) through fourteen (14) above.

16. The damages sustained by Dana-Farber were caused by BOC's negligence in;
- a. selling Dana-Farber a Freezer in a defective condition;
  - b. failing to inspect, test, repair and/or maintain properly the Freezer;
  - c. failing to warn Dana-Farber of the dangerous and defective condition of the Freezer;
  - d. failing to hire, train and/or supervise competent employees;
  - e. failing to ensure that the Freezer was monitored properly;
  - f. failing to ensure that the Freezer had a properly operating alarm system;
  - g. failing to ensure that applicable rules, regulations, ordinances, codes and/or statutes were complied with;
  - h. failed to provide adequate instruction and training regarding the operation of the Freezer;
  - i. failing to take necessary precautions to protect Dana-Farber's property from being damaged;
  - j. failing to maintain proper and safe nitrogen levels;
  - k. recommending that the subject freezer continue to operate between August 9, 2002 and August 15, 2002; and

1. otherwise failing to exercise due care under the circumstances and which may be revealed during the course of discovery in this matter.

17. As a direct and proximate result of BOC's negligence the damages to Dana-Farber's property referred to in paragraph fourteen (14) occurred.

WHEREFORE, plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund, demands that judgment be entered in its favor and against defendant, BOC Group, Inc. d/b/a BOC Gases, for its damages together with interest, attorney's fees, and the costs of prosecuting this action, and other relief the Court deems necessary and just and proper under the law.

**COUNT II**  
**BREACH OF CONTRACT**

18. Plaintiff incorporates by reference the averments of paragraphs one (1) through sixteen (17) above, as though fully set forth herein.

19. Pursuant to the aforesaid contract, defendant BOC agreed, *inter alia*, to provide and supply Dana-Farber with a Freezer that operated properly and was fit for its intended purpose.

20. Pursuant to the aforesaid contract, defendant BOC agreed, *inter alia*, to perform properly the inspection, maintenance and/or service work on the Freezer in accordance with safe methods and practices recognized by the industry and in a workmanlike manner and according to standard practices.

21. Defendant BOC breached its obligations under the contract by failing to provide and supply a Freezer that operated properly and was fit for its intended purpose.

22. Defendant BOC breached its obligations under the contract by failing to perform properly the aforesaid inspection, maintenance and/or service work of the subject freezer unit in accordance with all applicable codes, standards and other industry guidelines and in a safe and workmanlike manner.

23. As a direct and proximate result of BOC's breaches of contract the damages referred to in paragraph fourteen (14) above occurred, resulting in damage to Dana-Farber's property.

WHEREFORE, plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund, demands that judgment be entered in its favor and against defendant, BOC Group, Inc. d/b/a BOC Gases, for a just and adequate compensation for its damages together with interest, attorney's fees, and the costs of prosecuting this action, and other relief the Court deems necessary and just and proper under the law.

**COUNT III**  
**BREACH OF EXPRESSED AND IMPLIED WARRANTIES**

24. Plaintiff hereby incorporates by reference the averments of paragraphs one (1) through twenty three (23) above, as though fully set forth herein.

25. Defendant BOC expressly and impliedly warranted to Dana-Farber that the Freezer would operate properly and was fit for its intended purpose.

26. Defendant BOC expressly and impliedly warranted to Dana-Farber that the inspection, maintenance and/or service work would be performed and conducted in a professional, safe and workmanlike manner and in accordance with all applicable rules, regulations, ordinances, codes, statutes, and/or industry standards.

27. Defendant BOC breached its expressed and implied warranties by failing to sell and provide a Freezer that operated properly and was fit for its intended purpose.

28. Defendant BOC breached its expressed and implied warranties by failing to perform the inspection, maintenance and/or service work in a professional, safe and workmanlike fashion.

29. As a direct and proximate result of BOC's breaches of express and implied warranties the damages referred to in paragraph fourteen (14) occurred, resulting in damage to Dana-Farber's property.

WHEREFORE, plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund, demands that judgment be entered in its favor and against defendant, BOC Group, Inc. d/b/a BOC Gases, for a just and adequate compensation for its damages together with interest, attorney's fees,

and the costs of prosecuting this action, and other relief the Court deems necessary and just and proper under the law.

**COUNT IV**  
**BREACH OF WARRANTY/STRICT LIABILITY IN TORT**

30. Plaintiff hereby incorporates by reference the averments of paragraphs one (1) through twenty nine (29) above, as though fully set forth herein.

31. Defendant BOC failed to provide a Freezer that was fit and adequate for its foreseeable and intended use and free from defects in design, manufacture, assembly and/or warnings and instructions, which constitutes a breach of its warranties and obligations for which it is strictly liable in tort.

32. The subject Freezer was not altered or modified in any way by the plaintiff or a third-party. As a direct and proximate result of the above-referenced failure, plaintiff sustained damage to its property. Defendant is liable and legally responsible to the plaintiff for damages caused by the unit's failure to operate properly and maintain an adequate temperature and failing to preserve the contents located therein as set forth below:

- a. the Freezer was in a defective and unreasonably dangerous condition and could not be used without unreasonable risk of injuries to the plaintiff;
- b. the defendant failed to warn or instruct the plaintiff that the Freezer unit in question was dangerous and/or subject to failure;
- c. the warnings and instructions which accompanied the Freezer unit were inadequate and failed to provide sufficient notice to the plaintiff of the dangerous propensities of said product;
- d. the defendant misrepresented to the plaintiff and the general public that the Freezer unit in question was manufactured properly and safe for use by the public;
- e. the defendant failed to disclose to the plaintiff and the general public the dangerous propensities and defect of the Freezer;

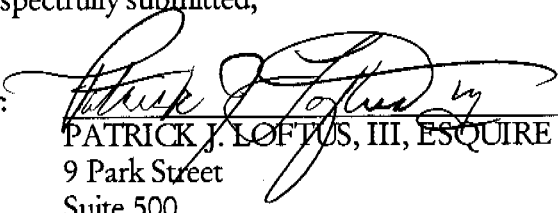
- f. the defendant failed to properly and adequately test the Freezer unit prior to selling it;
- g. the defendant designed, manufactured and/or sold said product in a defective manner;
- h. the defendant knew or should have know the dangerous characteristics of the Freezer, yet continued their manufacture and distribution;
- i. the defendant breached the implied warranty of merchantability and the Freezer was not of merchantable quality and fit for its intended purpose; and
- j. the defendant breached its expressed implied warranties that the Freezer unit was safe and effective for its intended use.

33. As a direct and proximate result of BOC's above outlined breach of warranty, Dana-Farber sustained damages as referred to in paragraph fourteen (14).

WHEREFORE, plaintiff, Dana-Farber Cancer Institute, Inc. a/k/a The Jimmy Fund, demands that judgment be entered in its favor and against defendant, BOC Group, Inc. d/b/a BOC Gases, for a just and adequate compensation for its damages together with interest, attorney's fees, and the costs of prosecuting this action, and other relief the Court deems necessary and just and proper under the law.

Respectfully submitted,

By:

  
PATRICK J. LOFTUS, III, ESQUIRE  
9 Park Street  
Suite 500  
Boston, MA 02108  
(616) 723-7770

Dated: 12/14/04

OF COUNSEL:  
Peter G. Rossi, Esquire  
Cozen O'Connor  
1900 Market Street  
The Atrium  
Philadelphia, PA 19103  
(215) 665-4734

Attorneys for Plaintiff

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

Dana-Farber Cancer Institute, Inc.  
a/k/a The Jimmy Fund

DEFENDANTS

BOC Group, Inc. d/b/a BOC Gases

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF  
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Patrick J. Loftus, III  
9 Park Street Suite 500  
Boston, MA 02108  
617-723-7770

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION

(PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |   | PTF                                   | DEF                                   |   | PTF                        | DEF                        |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY:

28 USC 1332(a)(1)

V. NATURE OF SUIT

(PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input checked="" type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Other			

VI. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION  
☐ UNDER F.R.C.P. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE

SIGNATURE OF ATTORNEY OF RECORD

*Patrick J. Loftus III*



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) Dana-Farber Cancer Institute, Inc.  
a/k/a The Jimmy Fund v. BOC Group, Inc. d/b/a BOC Gases -
2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).
- ☐ I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.
- ☐ II. 195, 368, 400, 440, 441-444, 540, 550, 625, 710, 720, 730, 740, 790, 791, 820, 830, 840, 850, 890, 892-894, 895, 950.
- ☒ III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- ☐ IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- ☐ V. 150, 152, 153.
3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(E)).  
n/a
4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT?  
n/a
5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? \_\_\_\_\_  
IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY? (SEE 28 USC 2403) \_\_\_\_\_
6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC 2284? \_\_\_\_\_
7. DO ALL PARTIES IN THIS ACTION RESIDE IN THE CENTRAL SECTION OF THE DISTRICT OF MASSACHUSETTS (WORCESTER COUNTY) - (SEE LOCAL RULE 40.1(C)). YES \_\_\_\_\_ OR IN THE WESTERN SECTION (BERKSHIRE, FRANKLIN, HAMPDEN OR HAMPSHIRE COUNTIES)? - (SEE LOCAL RULE 40.1(D)). YES \_\_\_\_\_
8. DO ALL OF THE PARTIES RESIDING IN MASSACHUSETTS RESIDE IN THE CENTRAL AND/OR WESTERN SECTIONS OF THE DISTRICT? YES \_\_\_\_\_ (a) IF YES, IN WHICH SECTION DOES THE PLAINTIFF RESIDE? \_\_\_\_\_
9. IN WHICH SECTION DO THE ONLY PARTIES RESIDING IN MASSACHUSETTS RESIDE? \_\_\_\_\_
10. IF ANY OF THE PARTIES ARE THE UNITED STATES, COMMONWEALTH OF MASSACHUSETTS, OR ANY GOVERNMENTAL AGENCY OF THE U.S.A. OR THE COMMONWEALTH, DO ALL OTHER PARTIES RESIDE IN THE CENTRAL SECTION \_\_\_\_\_ OR WESTERN SECTION \_\_\_\_\_

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME

Patrick J. Loftis, IIIADDRESS 9 Park Street Suite 500 Boston, MA 02108TELEPHONE NO. 617-723-7770